IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

T. M. Anderson,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

ANSWERING BRIEF OF DEFENDANT IN ERROR.

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I.

Appellant objects to the testimony describing the lands. The indictment charges a violation of chapter 115, Act February 23, 1917, which provides that

> "Any person who for a reward paid or prom-
> "ised shall undertake to locate for an intending
> "purchaser, settler or entryman any public lands
> "of the United States subject to disposition under
> "the public land laws, and who shall wilfully and
> "falsely represent to such intending purchaser,
> "settler or entryman that any tract of land shown
> "to him is public land of the United States, sub-

"ject to sale, settlement or entry, or that it is of "a particular surveyed description, with intent to "deceive the person to whom such representation "is made, or who in reckless disregard of the truth "shall falsely represent to any such person that "any tract of land shown him is public land of "the United States, subject to sale, settlement or "entry, or that it is of a particular surveyed de- "scription, thereby deceiving the person to whom "such representation is made, shall be deemed "guilty of a misdemeanor and shall be punished," etc.

39 Stat. 936, U. S. Compiled Stat. 1918, Sec. 10226a.

The particular violation in the second count of the indictment, upon which count only appellant was convicted, alleges that appellant

"* * * did knowingly, wilfully and unlawfully, and "for a promise of reward of four hundred eighty "dollars ($480.00), represent to an intending settler "and entryman, to-wit: one Emerson J. Rood, that a "certain tract of land shown to the said Emerson J. "Rood at said time and place by the said T. M. Ander- "son was public land of the United States, subject to "sale, settlement and entry, and did undertake to locate "said Emerson J. Rood on said land; and the said "T. M. Anderson further represented to the said Emer- "son J. Rood that the said land so shown to the said "Emerson J. Rood was of a particular surveyed de- "scription, to-wit: East half of section 8, township 8 "south, range 11 east, S. B. M., with the intent on the "part of the said T. M. Anderson to deceive the said

"Emerson J. Rood, to whom said representations were "made, and the said Emerson J. Rood was then and "there deceived by the said representations, and did "pay to the said T. M. Anderson as a consideration for "his services in undertaking to so locate the said "Emerson J. Rood on said land, the sum of four hun-"dred eighty dollars ($480.00), the said T. M. Ander-"son then and there well knowing that the land so "shown to the said Emerson J. Rood was not public "land of the United States subject to sale, settlement "and entry, and that the land so shown to the said "Emerson J. Rood was not the east half of section 8, "township 8 south, range 11 east, S. B. M., but on "the contrary was a part of the northeast quarter of "section 17; a part of the south half of section 9, and "a part of the northwest quarter of section 16, town-"ship 8 south, range 11 east, S. B. M. Contrary," etc.

One of the principal issues in this case was the identity of the lands in question. Anyone not an expert would have difficulty in telling what section or portion of a section a certain tract of land was located in. But anyone who had lands pointed out to him could describe its physical features, character of soil, etc., and thus identify it. In this case, in order to show and identify the lands alleged to have been pointed out by appellant to Rood, it was proper to have a description of the surface, contour, soil and its position with relation to any natural monuments presented in the evidence; and to establish that such land so pointed out was not the lands appellant caused Rood to enter, the description of the lands so entered, that is, the physical

appearance and condition and location with reference to natural monuments, was not only relevant, competent and material, but was necessary evidence. Any description of the land which would serve in any way to identify it was proper evidence.

I Wigmore on Evidence, sections 411, 412, 415, 433, 434.

II.

The evidence of what appellant told Rood about the quality of the soil and its suitability for agricultural purposes was also admissible upon three other grounds:

a. It is charged in the indictment that appellant had the intent to deceive Rood, and this is one of the elements of the offense, as it is defined in the statute. Every act and word of appellant to Rood, or, for that matter, every act or word that appellant caused anyone else to communicate to Rood with the purpose of causing Rood to close the negotiations for the land and pay him the money, was relevant and admissible to show appellant's intent. If he misrepresented the soil or its adaptability to any use, this was pertinent and competent evidence of his intent. This is elementary.

16 C. J., p. 565, Sec. 1096.

b. All of the things done and said between the parties during the consummation of the transaction was *res gestae,* and consequently relevant, competent and material. This is elementary.

16 C. J., p. 572, Sec. 1114.

c. Where a part of a conversation is admissible, the whole of it is admissible. This is elementary.

16 C. J., p. 634, Sec. 1263.

The court very carefully limited the effect of this evidence in his instructions. [Tr. pp. 45 to 49.]

III.

Appellant's objection to the instructions of the court is not that they do not correctly state the law, but that the "law of the case was smothered in too many words." The court's instructions are not open to this charge. The court is not under obligation to give instructions prepared by attorneys even though such instructions "hit the nail on the head." The instructions proposed by appellant [Tr. pp. 43-44] are fully, and more clearly, and better covered by the instructions given by the court. [Tr. pp. 46 to 48.] There is no error in this respect. This proposition is so well settled that no citation of authorities is necessary.

IV.

The issue in a criminal trial is "guilty or not guilty." The jury has a right, if it so desires, to render a special verdict, but the court will not instruct it so to do, as this would be error.

1 Bishop's New Crim. Proc., Secs. 1006 to 1007.

The Criminal Code of California provides for a special verdict where the jury is in doubt as to the legal effect of the facts found.

Cal. Penal Code, Secs. 1150, 1152, 1153, 1154, 1155.

But, even under this procedure, it would be error to instruct the jury to return a special verdict as requested in the case at bar. The court could have told the jury that they might return a special verdict if they saw fit, and were unable to agree as to the law and facts both; but even then the jury would have been entitled to return a general verdict if they so desired.

People v. Antonio, 27 Cal. 404, 408.

This practice is not followed in the Federal courts, and there was no error in the court's refusal of appellant's request for a direction of a special verdict.

It is the jury, and not the defendant, who has the right to resort to a special verdict. In the case at bar the jury was able to agree upon a general verdict and there was, therefore, no cause for a special verdict.

There is no error in the record and the judgment of the court below should be affirmed.

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